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ALEXANDER L. STEVAS,
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NO. 82-1464

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

UNITED STATES OF AMERICA

v.

HARVEY NOBEL,

Petitioner

PETITIONER'S REPLY BRIEF

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Because the trial judge in this case held a substantial stock ownership interest in the Insurance Company of North America, the victim of the crime, the Third Circuit held that he should have disqualified himself under 28 U.S.C. §455. In so holding, the Third Circuit acknowledged that it had established a new rule of law, which was in

direct conflict with the rule in the Fourth Circuit, as enunciated in United States v. Sellers, 566 F.2d 884 (4th Cir. 1977). Indeed, the government has recognized this conflict, and noted that the Third Circuit's decision conflicts with holdings of the Second Circuit and the Temporary Emergency Court of Appeals as well. (Gov't Br. at 8.)

However, while not attacking the propriety of the Third Circuit's decision mandating disqualification, the government seeks to have that court's affirmance of Petitioner's conviction upheld on grounds of "waiver." In arguing that the Third Circuit correctly found there had been a waiver, the government completely ignores the three principal arguments relied upon by Nobel to show there was no waiver.

First, petitioner argued (Pet. 16-20) that the Third Circuit erred in finding a

waiver because it impermissibly imposed its decision upon him as if it had been the law at the time of trial. Petitioner relied upon England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 422 (1964), and Chevron Oil Co. v. Huson, 404 U.S. 97 (1971).

The government's brief utterly fails to address this argument. Petitioner submits that certiorari should be granted, for the reasons stated in his Petition, to address this issue.

Second, petitioner explained (Pet. 20-23) the direct conflict between the Third and Seventh Circuits concerning whether failure to object to the judge's participation can constitute a waiver under §455. SCA Services, Inc. v. Morgan, 557 F.2d 110 (7th Cir. 1977), held that a party has no duty to object under the statute, and

therefore failure to object cannot be a waiver. The Third Circuit's decision in this case is in direct conflict with that holding.

As previously noted (Pet. 22), prompt resolution of this conflict is especially important because of its impact upon the relationship of lawyers and judges in dealing with the issue of judicial disqualification. Despite this fact, the goverment's brief totally ignores this issue.

Again, Petitioner submits that certiorari should be granted to resolve this conflict.

Third, the government, in its Court of Appeals brief (authored by the government attorney present during the colloquy with the District Court), expressly conceded that there had been no waiver. The

language of the colloquy supports this concession. Nevertheless, the Court of Appeals ruled that there had been a waiver, and the government now appears to support that view.

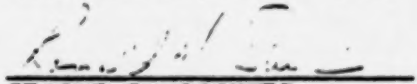
Congress has explicitly directed that purported waivers of disqualification be strictly construed. (Pet. 23-25.) The government's brief ignores this. Since in this case even the government cannot decide if it should argue waiver, it follows that the "waiver" was at best equivocal. To hold in such a case that the trial judge was required to disqualify himself, but that petitioner had waived that right, would fly in the face of clear Congressional intent.

Conclusion

The government's reply ignores the crucial issues relating to waiver raised in the Petition. Petitioner submits that

there are compelling reasons why certiorari should be granted in this case, and the government's reply raises no contrary considerations.

Respectfully submitted,



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CERTIFICATE OF SERVICES

I, Ronald H. Surkin, a member of the Bar of this Court, hereby certify that the attached Petitioner's Reply Brief was served upon all parties required to be served, as follows:

1. By depositing three copies thereof in the United States Mail, first class, postage prepaid, on June 1, 1983, addressed to:

Solicitor General
Department of Justice
Washington, D.C. 20530

2. By hand-delivering three copies thereof on June 1, 1983, to:

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